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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1604**

In the Matter of the Appeal by RS Eden/Eden House of the Determination of
Maltreatment and Order to Pay a Fine.

**Filed May 21, 2018
Affirmed; motion denied
Larkin, Judge**

Department of Human Services
File No. 19-1800-33740

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Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this certiorari appeal, relator challenges a maltreatment determination and fine issued by respondent Minnesota Department of Human Services (DHS) following the overdose death of a client who left relator's supervised-living facility against staff advice

and without his recently prescribed medication for heroin withdrawal symptoms. We affirm.

FACTS

Relator RS Eden/Eden House operates a residential facility in Minneapolis, which is licensed by DHS and the Minnesota Department of Health (MDH) to provide substance-use-disorder treatment. In March 2016, DHS received a complaint that RS Eden had refused to give J.W., a residential client, his prescribed Suboxone when he discontinued his residential treatment at RS Eden. Suboxone is a controlled substance, and it had been prescribed to J.W. to ease his symptoms of heroin withdrawal. J.W. overdosed days after leaving RS Eden.

The DHS investigator found that “facility staff persons made no attempts to contact [J.W.’s doctor], nor obtain a waiver from [MDH],” and that “staff persons were aware that not having this medication put [J.W.] at a greater risk of overdose.” The investigator concluded that “there was a preponderance of the evidence that there was a failure to provide [J.W.] with reasonable and necessary care or services.” DHS issued a determination of maltreatment and ordered RS Eden to pay a \$1,000 fine.

RS Eden appealed, and an administrative-law judge (ALJ) held a contested-case hearing. Seven witnesses testified at the hearing: Dr. John Simon, the doctor at Fairview Medical Center who prescribed J.W.’s Suboxone; Scott Broady, the licensing inspector who investigated the alleged maltreatment; Daniel Cain, the president of RS Eden; Kevin Evenson, the director of recovery services at RS Eden; James Tabatt, a senior counselor at

RS Eden; Stefanie Warren, a nurse at RS Eden; and Pamela Lindgren, a program director at RS Eden. The ALJ found the relevant facts to be as follows.

At the time of his admission to RS Eden, J.W. was a 28-year-old male with a long history of opioid dependence, detoxification treatments, and residential treatment for heroin and methamphetamine addictions. J.W. also had bipolar disorder and had been prescribed medication for that illness.

On February 20, 2016, J.W. was admitted to Fairview and diagnosed with severe opioid dependence. J.W. spent five days at Fairview for detoxification, and Dr. Simon prescribed a Suboxone taper to ease J.W.'s withdrawal symptoms after discharge from Fairview. A taper uses a gradual, reduced dosage of medication to make withdrawal symptoms more tolerable. J.W.'s Suboxone taper was prescribed to run from February 25 to March 19, 2017.

On February 25, J.W. was discharged from Fairview with the understanding that he would go directly to RS Eden. J.W. went to RS Eden on February 25, but he used marijuana and one gram of heroin after leaving Fairview and before arriving at RS Eden.

J.W. arrived at RS Eden without his prescribed Suboxone, but his mother brought him his Suboxone and bipolar medications later that day. RS Eden kept J.W.'s Suboxone in a secured area because it was a controlled substance, and RS Eden staff monitored his use of the medication. J.W.'s taper dictated that his dosage of Suboxone be reduced on March 2. On March 1, J.W. told RS Eden staff that he was concerned about his scheduled Suboxone reduction. On March 2, J.W. decided to leave RS Eden. Two RS Eden staff

members tried to convince J.W. to remain at RS Eden and continue treatment, but J.W. insisted on leaving.

RS Eden has a policy against releasing prescribed controlled substances to patients when they leave the facility. RS Eden's policy is consistent with a DHS administrative rule that prohibits release of controlled substances to departing residents. RS Eden staff could not release J.W.'s remaining Suboxone when he left the facility without violating the DHS rule. RS Eden did not attempt to contact Dr. Simon to discuss J.W.'s imminent departure without his Suboxone. A staff member gave J.W. his bipolar medication and advised him that RS Eden could not give him his remaining Suboxone. RS Eden destroyed J.W.'s Suboxone after he left the facility.

J.W. left RS Eden against staff advice on March 2. J.W. died from an overdose of "mixed-drug toxicity" (heroin, methamphetamine, and alprazolam) on March 7.

The ALJ recommended reversing DHS's maltreatment determination, reasoning that J.W. did not have an impaired ability to protect himself from maltreatment when he left RS Eden and therefore was not a vulnerable adult entitled to ongoing care. The ALJ rejected DHS's argument that RS Eden should have obtained a waiver of the DHS rule that prohibits release of controlled substances to departing residents.

The Minnesota Commissioner of Human Services modified the ALJ's findings and conclusions and rejected the ALJ's recommendation. The commissioner concluded that RS Eden's refusal to release J.W.'s remaining Suboxone to him was maltreatment by neglect. The commissioner affirmed the maltreatment determination and directed RS Eden to pay the \$1,000 fine. RS Eden appeals.

DECISION

I.

“Administrative-agency decisions enjoy a presumption of correctness” *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003). But this court will reverse an agency’s decision if it is unsupported by substantial evidence, arbitrary and capricious, or affected by other error of law. Minn. Stat. § 14.69 (2016). Substantial evidence has been defined as “[s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 668 (Minn. 1984). “[T]he burden is upon the appellant to establish that the findings of the agency are not supported by the evidence in the record, considered in its entirety.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

The commissioner need not give deference to an ALJ’s recommendation, so long as the commissioner’s decision is explained and supported by substantial evidence. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 267, 273, 279 (Minn. 2001) (affirming acting commissioner’s decision even though it was inconsistent with ALJ’s recommendation). The commissioner is required to “make an independent decision based on the record before [her], and [her] final decision must be supported by substantial evidence,” but she is “not required to treat the ALJ’s recommendation with the same deference an appellate court must accord the findings of a [district] court, as the ALJ’s report is only one part of the record.” *Id.* at 274 (citation omitted). When the commissioner deviates from the ALJ’s findings of fact, she should

explain the reason for the deviation. *See Dep't of Human Servs. v. Muriel Humphrey Residences*, 436 N.W.2d 110, 117 (Minn. App. 1989) (stating that DHS should not reject a factual finding without explanation), *review denied* (Minn. Apr. 26, 1989).

Under Minn. Stat. § 245A.07, subd. 1(a) (2016), the commissioner may impose a fine against a licenseholder who does not comply with applicable law or rule. Minn. Stat. § 245A.07, subd. 3(c)(4) (Supp. 2017), provides that “the license holder shall forfeit \$1,000 for each determination of . . . maltreatment of a vulnerable adult.” A vulnerable adult includes “any person 18 years of age or older who: (1) is a resident or inpatient of a facility” Minn. Stat. § 626.5572, subd. 21(a) (2016). It is undisputed that J.W. was a vulnerable adult while he was a resident of RS Eden. *See id.*

“Maltreatment” includes neglect. *Id.*, subd. 15 (2016). “Neglect” means:

The failure or omission by a caregiver to supply a vulnerable adult with care or services, including but not limited to . . . health care . . . which is:

- (1) reasonable and necessary to obtain or maintain the vulnerable adult’s physical or mental health or safety, considering the physical and mental capacity or dysfunction of the vulnerable adult; and
- (2) which is not the result of an accident or therapeutic conduct.

Id., subd. 17(a) (2016).

The commissioner concluded, “The Department established by a preponderance of the evidence that RS Eden maltreated J.W. by neglect.” The commissioner explained, “Extending to J.W. necessary care while on the facility’s premises included enabling him to maintain his own health and safety once he was no longer under the purview of RS Eden.” The commissioner further reasoned:

When J.W. made it clear that he would self-discharge, RS Eden knew of J.W.'s chemical dependency and relapse history and was aware of J.W.'s vulnerability to experience severe withdrawal symptoms if he did not have his Suboxone treatments. RS Eden's professionally-trained staff had reason to know, based on J.W.'s history and based on the nature of Suboxone treatments, that overdose was a significant risk for J.W. when he self-discharged The facility failed to act in J.W.'s best interest because staff knew that J.W. had entered the facility with the Suboxone medication, and had clear knowledge of his acute need for the medication. . . . J.W.'s physical and mental capacity and dysfunction required that reasonable efforts be made to acquire his Suboxone medication for his continuity of care upon discharge.

The commissioner's maltreatment determination rests on two theories. The first is based on RS Eden's failure to obtain a general or individual waiver of the DHS rule prohibiting the release of controlled substances to departing residents. The second is based on RS Eden's failure to make any effort to confer with J.W.'s prescribing physician given J.W.'s impending departure without his Suboxone. We address each theory in turn.

Failure to Obtain Waiver

RS Eden argues that the commissioner erred by finding that DHS proved by a preponderance of the evidence that "RS Eden failed to comply with an applicable law or rule by not seeking an individual or general permissive waiver [of] Minn. R. 4665.4600 to release J.W.'s Suboxone prescription to him when he left on his own accord and against the advice of professional staff." Minn. R. 4665.4600 (2017) provides:

If authorized by the attending physician or the resident's physician, medications belonging to residents shall be given to them when discharged or transferred. This shall be recorded in the resident's health record. Unused portions of controlled substances shall be handled by contacting the Minnesota Board of Pharmacy, which will furnish the necessary instructions and

appropriate forms, a copy of which shall be kept on file in the facility for two years.

Suboxone is classified as a controlled substance. *See* Minn. Stat. § 152.02, subd. 4(h) (2016) (classifying “[a]ny material, compound, mixture, or preparation containing the following narcotic drug or its salt: buprenorphine” as a Schedule III controlled substance). RS Eden therefore could not release J.W.’s Suboxone when he left RS Eden without violating rule 4665.4600.

However, Minn. R. 4665.0600 (2017) provides:

A supervised living facility may request in writing a waiver of a specific rule. The request for a waiver must cite the regulation in question, reasons for requesting the waiver, the period of time the licensee wishes to have the regulation waived, and the equivalent measures planned for protecting the health and safety of residents and staff. Waivers granted by the commissioner of health shall specify in writing the time limitation and required equivalent measures to be taken to protect the health and safety of residents and staff.

MDH Information Bulletin 04-12 dated July 2004 and titled, “Discharge/Transfer Of Individuals With Possession Of Controlled Drugs,” establishes a standard licensing waiver process from rule 4665.4600 that allows individuals who are discharged or transferred from a facility to retain possession of their controlled drugs, instead of having the facility destroy those drugs. It states:

Current licensure provisions require that licensees destroy controlled drugs and thus prohibit individuals/responsible parties from taking their controlled drugs with them when discharged or transferred and have prompted individual waiver requests to MDH. To avoid having to submit an individual waiver request to MDH, a licensee must follow the provisions set forth in this Information Bulletin.

The bulletin goes on to describe the conditions that must be met to obtain a general waiver of rule 4665.4600. Facilities are not required by law to apply for an individual or general waiver. *See* Minn. R. 4665.0600 (stating that a facility “may” request a waiver).

As support for the waiver-based maltreatment determination, the commissioner explained:

Because RS Eden accepted a client with a significant controlled substances use, recidivism, and failed treatment history, and the facility does so as a matter of course, RS Eden should have implemented the waiver procedures outlined in Bulletin 04-12 so that it was prepared to render the necessary care in the event individuals such as J.W. self-discharge against the advice of staff and require a protection against the risk of overdose.

The commissioner acknowledged that “Bulletin 04-12 does not require facilities to have waiver procedures in place,” but the commissioner nonetheless decided that “it is reasonable to expect that RS Eden should have had a general waiver option in place because of the high-level-needs clients the facility represents itself as effectively serving.”

RS Eden notes its compliance with rules 4665.4600 and 4665.0600 and argues, “If DHS seeks to change the law, it should not do so in this Court.” RS Eden’s point is well taken. RS Eden fully complied with rule 4665.4600 in refusing to release J.W.’s Suboxone, and RS Eden was not required to obtain a waiver under 4665.0600 or Bulletin 04-12. The commissioner’s decision suggests that rule 4665.4600 may not be consistent with the provision of reasonable and necessary care and services to certain individuals who seek treatment at licensed facilities and that certain facilities should be expected to obtain a general waiver of rule 4665.4600. Even if that is the case, the remedy is not to sanction

facilities for complying with the rule. In sum, the commissioner's finding of maltreatment and imposition of a fine based on RS Eden's compliance with rule 4665.4600 and failure to obtain an optional waiver is untenable because RS Eden did not violate an applicable law or rule. *See* Minn. Stat. § 245A.07, subd. 1(a) (authorizing imposition of a fine against a licenseholder who does not comply with applicable law or rule).

The commissioner also decided that RS Eden should have contacted J.W.'s prescribing physician to obtain an "individual waiver" of rule 4665.4600. However, rule 4665.0600 indicates that waivers are obtained from the commissioner of health, and not from prescribing physicians. *See* Minn. R. 4665.0600 (referring to "[w]aivers granted by the commissioner of health"). Information Bulletin 04-12 similarly refers to "individual waiver requests to MDH." RS Eden correctly notes, "There is no record evidence to suggest that obtaining a waiver is a quick or immediate process. In fact, Mr. Cain testified that 'there was no way to get a waiver for [J.W.] in a timely manner.'"

In sum, although agency decisions enjoy a presumption of correctness, in this case that presumption is overcome as to the commissioner's decision that RS Eden engaged in maltreatment by neglect by failing to obtain a general or individual waiver of rule 4665.4600.

Failure to Confer with J.W.'s Prescribing Physician

The commissioner also reasoned:

RS Eden is responsible for maltreatment of J.W. by neglect on the basis of its failure to make any effort to confer with [the prescribing physician,] Dr. Simon. This was both a reasonable and necessary action to take in light of J.W.'s known substance abuse history RS Eden staff, instead,

presumed and speculated that it would have been futile to try to contact Dr. Simon. While RS Eden designates itself as a facility that serves people who are deemed by other facilities as difficult to treat, RS Eden was unprepared on March 2, 2016 to meet the needs of [J.W.].

Although the record does not support the commissioner's suggestion that Dr. Simon could have waived application of rule 4665.4600 and authorized the release of J.W.'s remaining Suboxone, the record does not foreclose the possibility that Dr. Simon could have otherwise assisted J.W. to obtain Suboxone after he left RS Eden. The record establishes that RS Eden appreciated the importance of J.W.'s use of Suboxone and knew that Dr. Simon had prescribed Suboxone for J.W. shortly before J.W.'s admission to RS Eden. Yet RS Eden did not make any effort to contact Dr. Simon despite J.W.'s imminent departure from RS Eden without his prescribed Suboxone. At the hearing before the ALJ, Dr. Simon testified that, even if J.W. had planned to go home after his detoxification at Fairview, and not to a residential treatment facility, he still would have prescribed Suboxone to J.W.¹ Dr. Simon also testified that J.W. should have been released from RS Eden with his Suboxone.

The commissioner reasoned that contacting Dr. Simon "was both a reasonable and necessary action to take in light of J.W.'s known substance abuse history." Substantial evidence supports this reasoning. We discern no basis to disregard the presumption of

¹ At oral argument, RS Eden noted a new law, Minn. Stat. § 245G, which does not allow a controlled substance to be given for unsupervised use unless certain criteria are met. Minn. Stat. § 245G.22, subd. 6(a) (Supp. 2017). However, RS Eden acknowledges that this law was not in effect when the relevant events in this case occurred. 2017 Minn. Laws 1st Spec. Sess. ch. 6, art. 8, § 35, at 1895-96, 1902. We therefore do not consider its application here.

correctness that applies to the commissioner’s determination that, under the circumstances, RS Eden’s failure to make any effort to confer with Dr. Simon regarding J.W.’s care constituted maltreatment by neglect. We therefore hold that RS Eden’s failure to make any effort to confer with Dr. Simon given J.W.’s imminent departure without his prescribed Suboxone—a medication that clearly was necessary to obtain or maintain J.W.’s physical health or safety—substantially supports the commissioner’s determination of maltreatment by neglect.

At oral argument, RS Eden argued that there is no evidence that it would have been possible to reach Dr. Simon before J.W. left the facility or that conferring with Dr. Simon would have prevented J.W.’s death. We do not consider these arguments. Under the maltreatment statute, the issue is whether RS Eden failed to provide reasonable and necessary health care services for J.W. while he was a resident of the facility. Under the circumstances, it was reasonable and necessary for RS Eden to make some effort to confer with Dr. Simon before J.W. left the facility without his recently prescribed Suboxone. RS Eden’s failure to make any attempt to do so satisfies the maltreatment standard and ends the inquiry.

RS Eden also argues that the commissioner’s decision rests upon two erroneous factual findings: “that J.W. was a vulnerable adult when he left RS Eden and at all times after he left RS Eden, and that RS Eden continued to be J.W.’s caregiver during that same period.” We agree that the commissioner’s findings and reasoning on these points lacks factual and legal support. However, any error in the commissioner’s findings regarding whether J.W. was a vulnerable adult after he left RS Eden are immaterial given our

conclusion that the commissioner did not err in determining that RS Eden neglected J.W. before he left the facility, at a time when he was, by definition, a vulnerable adult. *See* Minn. Stat. § 626.5572, subd. 21(a)(1). Similarly, any error in finding that J.W. did not withdraw his consent for treatment when he left RS Eden is immaterial because it does not impact the maltreatment determination based on predischarge neglect.

Lastly, RS Eden argues that the commissioner's decision was "arbitrary and capricious because there is no evidence to show that DHS responds to allegations of this nature, and the record reflects that DHS did not conduct an investigation into Fairview Hospital even though J.W. was released without his Suboxone prescription into the community where he used drugs." RS Eden notes that the DHS investigator testified that he had not investigated licenseholders for failing to release a controlled substance to a departing client in the past and that DHS did not investigate Fairview for releasing "J.W. without the very same prescription." Again, this argument is immaterial because it does not impact our conclusion that the commissioner's maltreatment determination based on predischarge neglect is not erroneous.

RS Eden also argues that, "in declining to adopt the ALJ's findings, [the commissioner] appear[ed] to represent the agency's will, rather than its judgment." Although the commissioner modified the ALJ's findings and reached different conclusions, the commissioner adequately explained the modifications and her divergent conclusions. And although we discern error in some of the commissioner's findings and do not find all of her reasoning persuasive, the commissioner's determination of maltreatment by neglect based on RS Eden's failure to make any effort to confer with

Dr. Simon given J.W's imminent departure without his recently prescribed Suboxone was not arbitrary and capricious. We therefore affirm the determination.

II.

The commissioner moved to strike certain documents and references from RS Eden's brief, arguing that they are outside the record. These references include articles regarding the illegal sale of Suboxone, articles regarding the street value of Suboxone, and citations to various websites, including: (1) Drugs.com for the statement that concomitant use of Suboxone with other central nervous system depressants may increase the risk of severe respiratory depression, coma, and death; (2) the webpage of the American Society of Addiction Medicine (ASAM) for the ASAM criteria for assessing patient needs; and (3) RS Eden's own webpage in support of the statement that its stated goals for client intake are consistent with the ASAM criteria.

"The documents filed [with the ALJ], the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. By its very nature, review by certiorari is solely based on the record before the agency or other governmental body. *Amdahl v. County of Fillmore*, 258 N.W.2d 869, 874 (Minn. 1977). In this case, it is undisputed that the websites and articles are outside the existing record. The general rule is that an appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

We need not decide the motion to strike because our decision to affirm the maltreatment determination and fine is not impacted by the extra-record materials. The

challenged materials regard the wisdom of RS Eden's refusal to release J.W.'s remaining Suboxone upon his release. To be clear, our decision in this case is not based on RS Eden's refusal to release the Suboxone, which was in accordance with rule 4665.4600. It is based on RS Eden's failure to make any effort to confer with Dr. Simon given J.W.'s imminent departure without his prescribed Suboxone. Because the extra-record materials do not affect our decision, we deny the motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot where court did not rely on challenged material).

Conclusion

We reject the commissioner's conclusion that RS Eden's failure to obtain a general or individual waiver of DHS rule 4665.4600 constituted maltreatment by neglect. But we affirm the commissioner's determination that RS Eden's failure to make any effort to confer with Dr. Simon given J.W.'s imminent departure without his recently prescribed Suboxone constituted maltreatment by neglect. That determination finds substantial support in the record, and it is not arbitrary or capricious. We therefore affirm the maltreatment determination and fine on this limited ground.

Affirmed; motion denied.